IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-645

No. COA21-39

Filed 16 November 2021

Mecklenburg County, Nos. 17 CRS 203531, 17 CRS 203533

STATE OF NORTH CAROLINA,

v.

ZHAY MALIK PHILLIPS, Defendant.

Appeal by defendant from judgment entered 6 November 2019 by Judge Casey M. Viser in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 October 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kelly A. Moore, for the State.

Appellate Defender Glenn G. Gerding, by Assistant Appellate Defender Michele A. Goldman, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Zhay Malik Phillips ("Defendant") appeals from judgment entered upon a jury's verdict finding him guilty of possession of a firearm by a felon and resisting a public officer. Appellate counsel for Defendant filed an *Anders* brief on Defendant's behalf. After careful review of the trial proceedings, we find no prejudicial error.

I. Factual & Procedural Background

¶ 2 The State's evidence at trial tended to show the following: on 27 January 2017 at about 4:45 p.m., the Charlotte-Mecklenburg Police Department responded to a 911 call from a resident of the First Ward Apartments complaining that "a group of males [was] loitering in [the] parking lot of [the] apartment complex" and one man was possibly armed with a weapon. Officers Faulkner, Lawrence, Kelly, Pendergrass, and Colby arrived at the apartment complex in response to the service call. Upon arrival, the officers observed four males in the courtyard, located in the center of the apartment complex's parking lot. The officers approached the group to engage in conversation and to make voluntary contact with the individuals; the officers advised they were responding to a 911 call and explained the details of the call. The officers then asked the group if anyone had any weapons, if anyone was armed, and if the individuals would consent to the officers searching their persons for weapons. The individuals answered the officers' questions and cooperated. According to Officer Faulkner, he and Officer Lawrence questioned Defendant as to whether he had weapons. Defendant responded, "no, man. I don't have anything." With Officers Faulkner and Lawrence on either side of Defendant, Officer Lawrence performed a pat down on Defendant. Officer Lawrence testified he "felt a hard solid metal object" while patting down Defendant's front side. When asked by Officer Lawrence what

the object was, Defendant replied it was his belt buckle. Officer Lawrence pulled up Defendant's shirt revealing a firearm in the front waistband of his pants. Officers Faulkner and Lawrence placed Defendant's hands behind his back and handcuffed him. Officer Lawrence then removed a .22-caliber pistol from Defendant's waistband. Officer Lawrence handed the firearm to Officer Kelly, who then cleared a magazine from the firearm for safety. Immediately thereafter, Defendant fled on foot while handcuffed. Officers Faulkner, Lawrence, and Kelly pursued Defendant on foot as Defendant took off running. Officer Kodad joined the chase as he was arriving to the scene in his patrol car and witnessed Defendant running in handcuffs. Officer Kodad initially followed Defendant in his car, then chased him on foot, caught up with him, and arrested him. Following Defendant's arrest, Officer Kelly verified through the state's law enforcement database that Defendant was a convicted felon.

¶ 3 On 6 February 2017, Defendant was indicted on possession of a firearm by a felon pursuant to N.C. Gen. Stat. § 14-415.1, carrying a concealed weapon pursuant to N.C. Gen. Stat. § 14-269, and resisting a public officer pursuant to N.C. Gen. Stat. § 14-223. Prior to trial, the State dismissed the charge of carrying a concealed weapon.

¶ 4 On 4 November 2019, a jury trial was held before the Honorable Casey M. Viser, judge presiding. Counsel for defense moved to dismiss all charges at the close of the State's evidence on the basis there was insufficient evidence. The trial court

denied the motion. At the close of all evidence, defense counsel renewed its motion to dismiss all charges, which was also denied. The jury found Defendant guilty on both charges.

¶ 5 After calculating Defendant's prior record level at IV based on ten prior record points, and finding two mitigating factors and no aggravating factors, the trial court sentenced Defendant to a minimum term of 14 months and a maximum term of 26 months of imprisonment in the custody of the North Carolina Department of Correction. Defendant gave notice of appeal in open court.

II. Jurisdiction

¶ 6 This Court has jurisdiction to address Defendant's appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2019) and N.C. Gen. Stat. § 15A-1444(a) (2019).

III. *Anders* Brief

¶ 7 On appeal, counsel appointed to represent Defendant "is unable to identify an issue with sufficient merit to support a meaningful argument for relief on a direct appeal" and asks this Court to conduct its own review of the record for possible prejudicial error pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985).

¶ 8 Under *Anders*,

> a defendant may appeal even if defendant's counsel has

> determined the case to be "wholly frivolous." In such a situation[,] counsel must submit a brief to the court "referring to anything in the record that might arguably support the appeal." Counsel must furnish the defendant with a copy of the brief, the transcript, and the record and inform the defendant of his or her right to raise any points he or she desires and of any time constraints related to such right.

State v. Dobson, 337 N.C. 464, 467, 446 S.E.2d 14, 16 (1994) (citing *Anders*, 386 at 744, 87 S. Ct. at 1400, 18 L. Ed. 2d at 498); *see also State v. Randolph*, 328 N.C. 724, 403 S.E.2d 276 (1991). We hold Defendant's counsel has complied with the requirements of *Anders* and *Kinch* by advising Defendant of his right to file written arguments with this Court and providing him with the documents necessary to do so.

¶ 9 Defendant has not filed any written arguments on his own behalf with this Court, and a reasonable time for him to do so has passed. However, we note Defendant's counsel has directed our review to whether: (1) the indictments conferred jurisdiction on the trial court; (2) the trial court committed prejudicial error in allowing testimony concerning the substance of the 911 call; (3) the evidence is sufficient to support the charge of resisting a public officer; and (4) the trial court erred in calculating Defendant's prior record level, prior record points, and sentence.

¶ 10 First, we conclude the indictments were facially valid containing all requirements pursuant to N.C. Gen. Stat. § 15A-924(a) (2019), including the essential elements of the crimes charged. Therefore, the indictments properly conferred

jurisdiction on the trial court.

¶ 11 Second, we find no error with the trial court allowing testimony concerning the 911 call and providing a limiting instruction. "Hearsay" is defined by statute as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2019).

¶ 12 In this case, Officer Faulkner testified as to the details of the 911 call, to which he and the other officers responded. Defense counsel objected on the basis of the Confrontation Clause. Defense counsel then asked for a limiting instruction regarding the 911 call. The trial court provided a limiting instruction, explaining to the jury that "[t]he contents of the 911 call for service are being offered by the State to explain the officer[s'] actions when they arrived on the scene." The statement made by the 911 caller is an out-of-court statement; however, it is not being used "to prove the truth of the matter asserted." *See id.* Rather, details from the 911 call are being used to show why the officers responded to the call and their subsequent actions upon arriving to the apartment complex. Thus, the statement is not hearsay as used for this purpose.

¶ 13 Next, we consider whether the evidence is sufficient to support Defendant's conviction of resisting a public officer. The elements of resisting a public officer include: (1) the victim was a public officer; (2) the defendant knew or had reasonable

grounds to believe that the victim was a public officer; (3) the victim was discharging or attempting to discharge a duty of his office; (4) the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and (5) the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse. *State v. Dammons*, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612, *disc. rev. denied*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004); *see* N.C. Gen. Stat. § 14-223 (2019).

¶ 14 Here, it is undisputed Officer Kelly was a public officer. Defendant had reason to know that Officer Kelly was a public officer because he arrived in a patrol car, and other officers arrived at or around the same time, including Officer Lawrence, who testified he was wearing his police uniform. Officer Kelly was discharging a duty of his office by responding to the service call and helping to detain Defendant. Defendant resisted a public officer in the performance of his duty by fleeing the scene on foot after being placed in handcuffs while officers were clearing his weapon. Defendant acted willfully and unlawfully and without justification or excuse by intentionally fleeing on foot while officers were attempting to arrest him. *See Dammons*, 159 N.C. App. at 294, 583 S.E.2d at 612.

¶ 15 Finally, we consider the trial court's determination of Defendant's prior conviction level, prior conviction points, and sentencing. Defendant stipulated to having been convicted of one Class G felony, one Class E felony, and one Class 1

misdemeanor—all of which are North Carolina offenses. Defendant's two prior felony convictions were properly assigned four points each, while his misdemeanor conviction was properly assigned one point. An additional point was added to Defendant's prior record calculation because all the elements of the present offense for possession of a firearm by a felon are included in Defendant's prior 16 January 2015 offense. *See* N.C. Gen. Stat. § 1340.14(a)(6) (2019). Therefore, the trial court correctly determined Defendant's prior conviction points totaled ten, which corresponds to a prior record level IV for sentencing purposes.

¶ 16 The trial court consolidated Defendant's two offenses and imposed a single judgment based on the most serious offense, possession of a firearm by a felon, which is a Class G felony. *See* N.C. Gen. Stat. § 15A-1340.22 (2019). The active sentence ordered by the trial court fell within the mitigated range for a prior record level IV offender convicted of a Class G felony. *See* N.C. Gen. Stat. § 15A-1340.17(c)-(d). Therefore, the sentence imposed by the trial court was proper.

¶ 17 We find no error in the indictments; the trial court's admission of testimony regarding the 911 call; the sufficiency of the evidence supporting Defendant's conviction of resisting a public officer; or the trial court's calculation of Defendant's prior conviction points, Defendant's prior record level, and sentence. Moreover, we are unable to identify any other possible prejudicial errors in the record.

IV. Conclusion

¶ 18 In accordance with *Anders* and *Kinch*, we have fully reviewed the transcripts, record, and briefs to determine whether any issues of arguable merit can be identified and have found none. We find no prejudicial error and conclude Defendant's appeal is wholly frivolous.

NO ERROR.

Judges ZACHARY and WOOD concur.

Report per Rule 30(e).